ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21 and 74 to	)	MM Docket No. 97-217
Enable Multipoint Distribution	)	
Service and Instructional	)	
Television Fixed Service Licensees	)	File No. RM-9060
To Engage in Fixed Two-Way	)	
Transmissions	)	

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To: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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BELLSOUTH WIRELESS CABLE, INC.

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Summary

BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, "BellSouth") hereby oppose certain positions advanced by the National ITFS Association ("NIA"), Catholic Television Network ("CTN") and Instructional Telecommunications Foundation, Inc. ("ITF") in their petitions for reconsideration of rules adopted in this proceeding.

In its Petition, NIA asks the Commission to adopt all of the elements of the Joint Statement submitted by NIA and the Wireless Communications Association International, Inc.,thereby reversing the Commission's decision to require ITFS licensees to reserve access to a minimum of five percent of their stations' capacity in favor of a more restrictive minimum reservation and recapture requirement. NIA's position is untenable for two reasons. First, the Joint Statement was the product of negotiations between two trade associations, and as comments and other documents later filed in the proceeding revealed, did not reflect a consensus of the industry. Second, the Commission viewed the Joint Statement in the overall context of its overarching public policy goals, wisely selecting certain elements of the Joint Statement, rejecting others and looking beyond the four corners of the Joint Statement to afford educators additional flexibility.

CTN and ITF ask the Commission to retreat from its streamlined processing rules by requiring filing windows, two-tiered application grants and Commission determinations of mutual exclusivity. These proposals would undermine the basic tenets of the two-way rules: expeditious processing and industry oversight. To the extent that their arguments are designed to ensure that ITFS licensees are protected from interference, other more efficient and less restrictive means are available.

CTN also proposes a plan that would require stations causing harmful interference to cease transmitting upon the mere filing of a "documented complaint" of interference. As BellSouth has urged, cases of interference should be resolved expeditiously, but not without Commission intervention or an opportunity for the alleged offender to respond. However, CTN's plan can be integrated with BellSouth's proposal for expedited resolution of interference disputes, so long as any mandated service interruptions are the result of reasoned Commission action.

Accordingly, BellSouth requests that the rule and policy changes proposed by NIA, CTN and ITF be rejected for the reasons discussed in the accompanying Opposition.

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To: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, "BellSouth"), by their attorneys and pursuant to Section 1.429(f) of the Commission's Rules, hereby oppose certain arguments raised in petitions for reconsideration of the *Report and Order*, FCC 98-231, released September 25, 1998 (the "*Two-Way Order*").[1]

Introduction

The eleven petitions for reconsideration filed in this proceeding generally confirm that the rules adopted in the *Two-Way Order* will accomplish the Commission's stated objectives to streamline application processing and enable advanced services to be provided to the public.

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[1] Notice of the filing of petitions for reconsideration appeared in the Federal Register on January 20, 1999. *See* 64 FR 3104 (January 20, 1999). Pursuant to Section 1.4(b)(1), the deadline for filing oppositions to such petitions is 15 days after such publication, or February 4, 1999. Thus, this Opposition is timely filed.

One party, Instructional Telecommunications Foundation, Inc. ("ITF"), filed its opposition on January 11, 1999, and stated therein that it would address the proposals advanced in BellSouth's petition for reconsideration in a subsequent filing. To the extent necessary, BellSouth will address the substance of ITF's opposition, and any further opposition it may file, in its Reply.

Indeed, a common theme in the petitions is a desire to further relax regulations by, for instance, applying the streamlined application procedures to ITFS modification applications[2] and easing the notice requirements applicable to response stations located in the "notification zone."[3]

Three petitioners, however, seek to turn back the clock by undoing some of the most important rule changes the Commission adopted. The National ITFS Association ("NIA"), without proffering any new arguments, asks the Commission to incorporate all of the elements of the Joint Statement of Position ("Joint Statement") to which NIA and the Wireless Communications Association International, Inc. ("WCA") agreed, in particular the point regarding recapture of capacity for educational use. Catholic Television Network ("CTN") requests that the Commission abandon the rolling one-day filing window procedures for high-power booster and response station applications in favor of periodic and regular filing windows, and ITF requests that the Commission determine whether two-way applications are mutually exclusive. CTN also asks the Commission to establish a two-track interference complaint process that could require stations to cease providing service to the public before the Commission has even had an opportunity to review the matter.

Properly considered, these proposals constitute a step in the wrong direction and, if adopted, would contravene the basic premise of the *Two-Way Order*, potentially prolong the grant

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[2] *See, e.g.*, Petition for Reconsideration filed by BellSouth at 2-7; Petition for Reconsideration filed by Petitioners at 17-19; Petition for Reconsideration filed by San Francisco-San Jose Educator/Operator Consortium at 2-4; and Petition for Reconsideration filed by National ITFS Association ("NIA") at 8.

[3] *See, e.g.*, Petition for Reconsideration filed by Petitioners at 6-14; Petition for Reconsideration filed by C&W Enterprises at 3-4; and Petition for Reconsideration filed by ITFS Commenting Parties at 6-7.

of applications and generally wreak havoc with the regulatory regime established to inject new life into the MDS and ITFS services. For the reasons discussed below, BellSouth opposes certain positions advanced in petitions for reconsideration filed by the NIA, CTN and ITF.

Discussion

I. THE COMMISSION'S DECISION NOT TO ADOPT CERTAIN PORTIONS OF THE JOINT STATEMENT WAS WELL REASONED AND CONSISTENT WITH THE PUBLIC INTEREST.

In its Petition, NIA argues that the Commission erred in not adopting all the elements of the Joint Statement. According to NIA, the Joint Statement represents a "negotiated consensus" between NIA and WCA that was achieved "only . . . when all of the issues were considered a single independent concept."[4] As an example, while the Commission adopted the Joint Statement's proposed mandatory five percent digital capacity reservation, NIA protests that the Commission failed to embrace the Joint Statement's proposal for an additional 20 percent of digital capacity for elective recapture.[5]

Authored by two trade associations, the Joint Statement did not reflect the views of all affected operators or educators, nor was the Commission persuaded that it should be adopted in its entirety. Rather, the Joint Statement properly was construed only as an initial starting point in the process of establishing ITFS leasing rules for the digital era. Following the Joint Statement's submission to the Commission, educators and operators not directly involved in the negotiation of the Joint Statement presented their views on the issues. An important dialogue

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[4] NIA Petition at 6.

[5] *Id.* at 6-8.

emerged, providing valuable insight to the Commission as it fashioned rules to govern the relationship between educators and operators. Significantly, this dialogue revealed that the Joint Statement did not enjoy universal support from either operators or educators. Among these filings were the comments of the ITFS Parties, a group of more than 35 ITFS licensees, which stated that:

> with respect to minimum ITFS programming requirements, the FCC should continue to require ITFS licensees only to provide (at a minimum) 20 hours per channel per week of ITFS programming. . . . The fact that a licensee participates in a digital system, making possible far greater capacity, does not change the licensee's need for or capability to provide programming.
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> . . . .
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> . . . Moreover, philosophically, the ITFS Parties believe that they should be free, within certain minimal boundaries relevant to all ITFS licensees, to evaluate their current and future capacity needs and negotiate reservation or recapture provisions consistent with those needs. Stated another way, ITFS licensees should not be required to retain capacity they don't anticipate needing at the expense of receiving financial, programmatic or facility concessions that they could obtain if they only retained the capacity they actually need.[6]

As is apparent from the *Two-Way Order*, the Commission considered all of the elements of the Joint Statement, as well as the comments, reply comments and *ex parte* presentations submitted in the proceeding. With respect to the Joint Statement, the Commission stated that:

> while we find some of its approaches sound, . . . we find some of its provisions unworthy of adoption. Thus, notwithstanding the *Joint Statement*'s self-characterization of its "series of compromises" as "inextricably intertwined," as well as its plea that

[6] Comments of ITFS Parties at 13-14.

> we adopt it "en toto without change," we will adopt some of its resolutions and modify or reject others.[7]

In the end, the Commission balanced the views of NIA and WCA with those of other commenters and concluded that:

> because we seek to maximize the flexibility of educators and operators to design systems which best meet their varied needs, we will adopt ITFS excess capacity leasing rules which best promote this flexibility while at the same time safeguarding the primary educational purpose of the ITFS spectrum allocation. After a careful review of the comments in this proceeding, we decide that these goals are best harmonized where digital transmissions are utilized by retaining the current 20 hours per channel per week educational usage requirements, adopting the *Joint Statement*'s proposed absolute reservation of a minimum of 5% of an ITFS station's capacity for instructional purposes only, and eliminating the requirements setting aside capacity for ready recapture by ITFS licensees.[8]

The Commission emphasized "that an ITFS licensee may reserve for itself in excess capacity lease negotiations more than the minimum required reservation of capacity, and is free not to lease its excess capacity at all if it does not wish to do so."[9]

To the extent NIA may be concerned that the Commission somehow shortchanged educators, it is significant to note that the Commission looked beyond the Joint Statement to adopt rules intended to provide educators with flexibility and safeguards in ways the Joint Statement did not. For instance, the Commission expanded its definition of qualified educational uses,[10]

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[7] *Two-Way Order* at 42 (footnote omitted).

[8] *Id.* at 45-46 (footnotes omitted).

[9] *Id.* at 47 (footnote omitted).

[10] *Id.* at 40-42.

eliminated the time-of-day restrictions on ITFS programming[11] and amended Section 74.931 to eliminate rules that permitted operators to use more excess capacity in the first two years of the license term as operations are phased in.[12] The Commission also confirmed that where an ITFS licensee engages in channel shifting, this will not be considered adversely when seeking license renewal.[13]

The above discussion illustrates that, in discharging its statutory duty to act in the public interest, the Commission properly weighed the points presented in the Joint Statement along with comments of other parties to create a comprehensive structure regarding the use of digital ITFS capacity that is manifestly in the public interest. NIA presents no new arguments or information sufficient to reverse the Commission's decision and disrupt the balance struck in the *Two-Way Order*.

II. THE COMMISSION ESTABLISHED APPROPRIATE TWO-WAY APPLICATION PROCESSING RULES.

Both CTN and ITF seek to eviscerate the streamlined application processing rules that are the hallmarks of the *Two-Way Order*, in favor of a return to a processing scheme that has long burdened Commission staff and caused lengthy licensing delays. In a footnote that cites only its earlier-filed comments and contains no additional discussion, CTN asks the Commission to abandon the rolling, one-day filing windows and instead "open[] periodic and regular filing

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[11] *Id.* at 48.

[12] *Id.* at 46, n.222.

[13] *Id.* at 56.

windows for two-way applications to avoid overly burdensome application filings."[14] This approach presents several problems. First, the establishment of filing windows will delay the licensing, grant and implementation of advanced ITFS and MDS services. In the Commission's experience with ITFS filing windows, the filing of a large number of applications at one time creates delays in placing applications on public notice and backlogs in processing. Second, there can be no assurance as to how "regularly," or frequently, such filing windows would be opened, creating uncertainty and even greater delays. Operators and licensees simply cannot afford the risk that, as was the case with ITFS filing windows, the promise of regular filing windows will devolve into a practice of infrequent filing windows.[15] Third, filing windows have not proved necessary in the MDS service, where applications can be filed at any time and processed expeditiously. CTN's proposal once again should be rejected.

Likewise, the Commission should reject ITF's proposal to require Commission staff to review two-way applications and determine whether they are mutually exclusive. One of the most important benefits of the *Two-Way Order* is a licensing regime predicated on industry cooperation rather than paternalistic government regulation. Notwithstanding this fundamental precept of the two-way rules, ITF disagrees with the Commission's conclusion that the incentive to resolve

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[14] CTN Petition at 2, n.3. In the same footnote, CTN also reiterates its request that the Commission adopt a two-step licensing system for two-way systems in order to ensure interference protection rights to ITFS stations. For the reasons discussed in the *Two-Way Order*, this argument should again be rejected. *See Two-Way Order* at 136, n. 165. With adoption of the expedited interference dispute resolution procedures urged by BellSouth in its Petition, CTN's processing scheme would be unnecessary. *See* Part III, *infra*.

[15] This risk is one of several reasons why BellSouth, in its Petition, proposes to extend the streamlined processing rules to ITFS major change applications. *See* BellSouth Petition at 2-7.

interference "will be so great that Commission involvement will be unnecessary to resolve disputes."[16] The effect of ITF's proposal is to limit instances where applications could be automatically granted, thereby delaying service to the public.

Although BellSouth generally agrees that Commission involvement may, in some circumstances, be necessary to resolve interference disputes, BellSouth does not believe such intervention should be at the expense of automatic application grant. Rather, as previously advocated by BellSouth, expedited Commission resolution of actual harmful interference would be a more efficient means of policing interference.[17] In this manner, Commission staff would not have to spend time and resources to analyze applications to determine whether they are mutually exclusive.[18] Applications thus could be automatically granted, and resolution of interference would be reserved for cases of actual harmful interference. Where, for instance, co-channel applications would be deemed mutually exclusive because they only provide 44 dB protection (rather than the required 45 dB), the level of interference might be imperceptible and not objectionable, especially if both systems are utilizing digital technology where there is greater tolerance for interference. Under ITF's proposal, Commission staff will have unnecessarily

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[16] *Two-Way Order* at 35.

[17] In Part III hereof, BellSouth discusses the means by which CTN's proposal to resolve interference claims can be modified and integrated into BellSouth's expedited dispute resolution scheme.

[18] BellSouth also opposes CTN's suggestion that interference analyses be filed with two-way applications. *See* CTN Petition at 17-20. First, the requirement to submit complex and voluminous interference analyses may prevent such applications from being electronically filed. Second, the analyses must be served on affected parties and provided to the Commission's copy contractor. Third, such information in any event will not be reviewed by the Commission prior to grant. Thus, there is no reason to require interference analyses as part of the application.

determined that the applications are mutually exclusive and delayed grant, even though the parties do not object to the situation. It would be a far better use of Commission resources if it had only to adjudicate actual cases of harmful interference to which another party actually objected.

III. CTN'S INTERFERENCE COMPLAINT PROCEDURES SHOULD BE MODIFIED AND MADE A PART OF THE EXPEDITED DISPUTE RESOLUTION PROCESS ADVOCATED BY BELLSOUTH.

Like BellSouth, CTN generally supports the Commission's rules requiring licensees to promptly cure any interference they may cause, but is concerned that the Commission's rules do not clearly define the parties' procedural rights. To provide greater clarity, CTN proposes a two-track system: first, where a complainant presents "documentary evidence of high reliability that the facility at issue is causing the interference," the alleged offending station would be required to cease transmitting within two hours of receiving a faxed date-stamped copy of the interference complaint that is not accompanied by a Commission order; and second, where the source of interference is in question, a complainant could file a notice with the Commission, permitting the alleged offending licensee three business days to submit proof that it is not the source of interference.

While well-intended, this system does not afford licensees due process and could result in baseless disruption of service to the public. As for CTN's "fast-track" alternative, it is simply unfair for one licensee to compel another licensee to terminate service to the public, without first

affording the Commission an opportunity to review the allegations and without the alleged offender having any specified right to challenge the information in the complaint prior to mandated service disruption.[19]

BellSouth believes that, if properly modified, CTN's plan can be integrated with BellSouth's expedited dispute resolution proposal. Upon the filing of an interference complaint, the complainant could, if it so desired, concurrently file a motion for a temporary order seeking to have the interfering station cease transmitting pending a Commission decision. Both the complaint and the motion would be served by a reliable overnight service, signature required, and the Commission would confirm that service had been effected. The Commission could, upon clear and convincing evidence of actual harmful interference, issue an order requiring the station to cease transmitting or make other temporary modifications to its transmission system (*e.g.*, reduce power), pending Commission staff action on the complaint.

From that point, BellSouth's plan for expedited resolution of the interference complaint would apply.[20] An opposition to the complaint would be due within 10 days of the filing of the complaint, with a reply due five days thereafter. Then, a 15-day settlement period would commence. The Commission's decision would be rendered within 90 days of the filing of the initial complaint.

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[19] There may be legitimate questions surrounding the competency or thoroughness of the information filed with the Commission as part of the complaint. There also are practical concerns: What if the notice is received at 2:00 a.m.? What if the fax telephone number is incorrect or was changed? What if the fax machine is out of paper?

[20] This plan is discussed in detail in BellSouth's Petition at 7-10. To the extent this plan is understood to apply to predicted interference as well as actual interference, BellSouth hereby clarifies that its proposal for expedited resolution applies only to allegations of actual interference.

In the few cases where parties are not able to resolve interference through the exercise of good faith efforts, the above plan provides a prompt and certain process for requiring a station causing interference to cease transmitting an interfering signal. With the Commission retaining the authority to issue temporary orders – rather than permitting private parties unilaterally to require each other to cease transmitting – the interference dispute resolution process will be subject to less abuse. With BellSouth's plan to expedite the complaint process, coupled with concepts from CTN's proposal as discussed above, clear cases of harmful interference can be remedied quickly and more difficult cases can be resolved through the exchange of pleadings and settlement discussions.

Conclusion

In view of the foregoing, BellSouth requests that the rule and policy changes proposed by NIA, CTN and ITF be rejected for the reasons discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victor Onyeoziri, with the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that the foregoing "Opposition to Petitions for Reconsideration" were served on the below listed parties by First Class U.S. Mail this 4th day of February, 1999.

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